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18  
19 **UNITED STATES DISTRICT COURT**  
20 **DISTRICT OF NEVADA**

21 Cung Le, Nathan Quarry, Jon Fitch, Brandon  
22 Vera, Luis Javier Vazquez, and Kyle  
Kingsbury on behalf of themselves and all  
23 others similarly situated,

24 Plaintiffs,

25 v.

26 Zuffa, LLC, d/b/a Ultimate Fighting  
Championship and UFC,

27 Defendant.  
28

Case No.: 2:15-cv-01045-RFB-(PAL)

**ZUFFA, LLC'S REPLY IN  
SUPPORT OF MOTION TO  
EXCLUDE THE TESTIMONY OF  
PLAINTIFFS' EXPERT GUY A.  
DAVIS UNDER FED. R. EVID. 702  
AND DAUBERT**

**HEARING REQUESTED**

1 In their opposition (ECF No. 535) (“Opposition”) to Zuffa, LLC’s Motion to Exclude the  
 2 Testimony of Guy A. Davis (ECF No. 517), Plaintiffs do not respond to Zuffa’s point that expert  
 3 testimony regarding its hypothetical financial capacity to increase athlete compensation in the  
 4 past is irrelevant and prejudicial. Plaintiffs concede that Zuffa’s *actual* revenues do not matter for  
 5 purposes of calculating damages, and Zuffa does not owe damages because it has the capacity to  
 6 pay them: “What matters is what the industry-wide revenues would have been in the but-for  
 7 world.” Opp. at 3. Plaintiffs do not and cannot explain how Mr. Davis’s selective manipulation  
 8 of Zuffa’s financials will assist the trier of fact in determining what damages, if any, to which the  
 9 putative class could be entitled. Mr. Davis’s testimony should be excluded for this reason alone.

10 Even if his testimony were relevant, the testimony should be excluded because his model  
 11 is biased (and therefore unreliable). He admits he designed it specifically to free up cash flow in  
 12 service of Plaintiffs’ desired conclusion that Zuffa could have afforded to pay athletes more  
 13 money. Moreover, the jury does not require an accountant’s special expertise on the simple point  
 14 that Zuffa has money to pay more to athletes, or anyone else. Zuffa also maintains its argument  
 15 that Mr. Davis’s financial models were improperly and untimely disclosed as rebuttal testimony.

16 I. Testimony Regarding Zuffa’s Capacity To Increase Pay Is Not Relevant And May  
 17 Mislead The Jury.

18 Mr. Davis opines [REDACTED]  
 19 [REDACTED] Opp. at 1. This “capacity to pay”  
 20 opinion is unduly prejudicial and not relevant to a disputed issue. Plaintiffs’ *only* defense is that  
 21 Zuffa “placed its finances squarely at issue by presenting expert testimony from Elizabeth Davis  
 22 that [REDACTED]  
 23 [REDACTED] *Id.* at 4. This mischaracterizes Ms. Davis’s opinion. More  
 24 importantly, Plaintiffs ignore Zuffa’s argument that the testimony of their expert is not relevant to  
 25 a disputed issue and may mislead the jury.

26 Despite Plaintiffs’ arguments concerning which side put Zuffa’s historical finances at  
 27 issue, neither party disputes that the legal inquiries are: (1) whether Zuffa’s financial capacity to  
 28 increase athlete compensation by some arbitrary amount is relevant to the issues in this case; and

(2) if relevant, whether this analysis is likely to confuse and prejudice the jury. For Plaintiffs, Mr. Davis offers a hypothetical alternative to both Zuffa's actual financial structure and Dr. Singer's but-for world. His model assumes Zuffa changed its historical capital and expense structure to free up cash for athlete compensation, offering a different, allegedly more "conservative," approach to running the company. Ex. 4 at 229:21–230:14.<sup>1</sup> It may be that "lay jurors have no way of determining, absent expert testimony, how much more" Zuffa could have paid athletes while remaining profitable, Opp. at 4, but this jury will not be charged with that inquiry, so the testimony is irrelevant. The testimony does not relate to market power, anticompetitive effects, damages, or any other disputed issue; Plaintiffs do not contend otherwise. And Plaintiffs are not entitled to damages because Zuffa has the capacity to pay them now or in the past.

Plaintiffs offer neither case law nor argument to explain how this testimony would assist the trier of fact. The only remaining possibility is that Plaintiffs intend to offer this evidence, including the statement that Zuffa could have reduced its "excessive spending on private jets," *id.* at 1, to prejudice a jury. Thus, the testimony should be excluded because it is not "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)).

Ignoring the requirements for admissibility, Plaintiffs dedicate much of their Opposition to quibbling over which party put Zuffa's finances at issue. That issue has no bearing on admissibility under FRE 702. *See Gallardo v. United States*, 2012 WL 1191864, at \*5 (D. Colo. Apr. 10, 2012) (rejecting argument that plaintiff's expert opinion is relevant under FRE 703 "because defendant 'opened the door' to the testimony"). Plaintiffs cite no authority for the proposition that expert testimony is relevant whenever another expert opines on the same subject matter.<sup>2</sup> Regardless, Ms. Davis did not put Zuffa's "capacity to pay" at issue. In his initial

<sup>1</sup> Except where noted, exhibits referenced in this brief are exhibits to the Declaration of Nicholas A. Widnell, which was attached to the Motion. *See* ECF No. 517-2.

<sup>2</sup> *Oracle USA, Inc. v. Rimini Street, Inc.*, 2015 WL 5165374 (D. Nev. Sept. 3, 2015) is inapposite. In that case, the court denied the plaintiff's motion to exclude evidence of its assets, revenues, and

report, Mr. Davis opined that Zuffa could have paid athletes “substantially more than the amounts it actually paid.” Ex. 1 at 18. Plaintiffs later asked *Ms. Davis* whether *she* was offering an opinion on whether Zuffa could have paid athletes more using debt or other means; she testified that she was not and that she had not done the analysis. Decl. of Stacey K. Grigsby, Ex. 1, Dep. of Elizabeth Davis, 190:10–191:5. Plaintiffs nonetheless contend Ms. Davis “opened the door” to Mr. Davis’s opinions. But a fair reading of Ms. Davis’s report makes clear she is not offering an opinion, as Plaintiffs suggest, “that Zuffa *could not afford* to pay Fighters the amounts claimed by Plaintiffs as damages.” Opp. at 1 (emphasis added). Rather, she explains how increasing athlete pay by the amount of Plaintiffs’ estimated damages would have affected Zuffa’s profitability.

This distinction is meaningful because rebuttal testimony requires “a showing of facts supporting the opposite conclusion” from an opposing party’s expert. *R & O Const. Co. v. Rox Pro Int’l Grp.*, 2011 WL 2923703, at \*2 (D. Nev. July 18, 2011) (quotation omitted). The opposite of Ms. Davis’s conclusion would be that [REDACTED]. Mr. Davis takes an entirely different approach, devising a methodology to determine “how much more Zuffa could have paid its fighters, assuming alternative but feasible expense and capital structures.” Ex. 3 at ¶ 5. This does not rebut Ms. Davis’s opinion.

## II. The Testimony Is Unreliable Because It Is Based On Unsound, Biased Methodology.

Plaintiffs try to buttress their argument that Mr. Davis’s analysis is “sound” by labeling it “rigorous and consistent with accepted accounting principles.” Opp. at 7. This characterization is insufficient to show the testimony is reliable. *Stephen L. v. Hamamoto*, 2009 WL 10676989, at \*6 (D. Haw. Mar. 20, 2009) (dismissing conclusory statements about reliability). By Mr. Davis’s own admission, (1) his analysis fails to account for the but-for world, which he insisted he would

other financial metrics because the plaintiff “open[ed] the door” when it stated that it would proffer evidence of its annual spending on software research and development. *Id.* at \*3. Here, unlike in *Oracle*, Zuffa does not intend to introduce evidence on its capacity to pay in its case-in-chief, and the testimony proffered by Zuffa (the financial effect of allocating damages to Zuffa’s actual historical financials) materially differs from the testimony Plaintiffs seek to introduce (Zuffa’s capacity to increase compensation assuming hypothetical changes to its capital and expense structures).

1 have to consider, and (2) he designed his model with the specific purpose of freeing up as much  
 2 cash as possible to increase historical athlete pay. This renders his conclusions unreliable.

3 Mr. Davis did not reach an opinion on how much more Zuffa could have paid athletes in a  
 4 world without the conduct Plaintiffs challenge (the “but-for” world). Mot. at 4. He did admit  
 5 that, in that but-for world, both Zuffa and its competitors could have paid athletes who were  
 6 under contract with Zuffa, and that Zuffa would have been a “different,” potentially “smaller,”  
 7 company. *Id.* But as Mr. Davis testified, “any hypothetical” involving “paying fighters more  
 8 money” requires a description of the but-for world, which he did not provide. *Id.* By increasing  
 9 athlete pay but not accounting for factors such as Zuffa’s size and the size of the MMA industry,  
 10 Mr. Davis violates his own standard.

11 In addition, Mr. Davis’s increased compensation scenarios are not based on scientifically  
 12 valid methodology. *Id.* at 10–12. Contrary to *Daubert*, the underlying methodology uses data  
 13 from outside the Class Period and is “contrived to reach a particular result,” *Rink v. Cheminova,*  
 14 *Inc.*, 400 F.3d 1286, 1293 n.7 (11th Cir. 2005), *i.e.*, to reallocate as much money as possible for  
 15 athlete pay. His hypothetical modifications to Zuffa’s capital and expense structure begin in  
 16 2007, well before the Class Period begins. Mot. at 7. He takes advantage of more than a decade  
 17 of Zuffa’s financial records and insight into its growth trajectory and capital requirements,  
 18 reimagining the company’s capital and expense structure based on this perfect hindsight.

19 Plaintiffs argue that “Mr. Davis has not cherry-picked his data; he used all of Zuffa’s  
 20 available financial information from 2005-2016.” Opp. at 8 n.10. But Zuffa argued that Mr.  
 21 Davis “cherry-pick[ed] *assumptions*” in designing his hypothetical model, not raw financial data.  
 22 Mot. at 9 (emphasis added). To generate additional cash flow for purposes of financing increased  
 23 athlete compensation, Mr. Davis assumes: [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED] Mr. Davis testified that the “whole premise” of  
 28 the model was to redistribute as much money from shareholders to athletes as possible “without

1 creating a financial issue for the company.” Ex. 4, 208:7–16. This approach is far from  
 2 “conservative” because it is premised on fundamental changes to Zuffa’s business that Zuffa’s  
 3 management could not possibly have made in real time without a crystal ball. Plaintiffs contend  
 4 Mr. Davis used “accepted accounting principles” (Opp. at 7); the reality is that he started with a  
 5 preordained conclusion and worked backward to make it seem feasible.

6 The Opposition ignores the general principle running through the case law: hindsight bias  
 7 and *ex post* reasoning can distort and undermine an expert’s methodology. Mot. at 11. Mr. Davis  
 8 should not be permitted to testify about how much more Zuffa could have paid athletes during the  
 9 Class Period because this conclusion is inextricably tied to his flawed methodology.

10 III. It Requires No Special Expertise To Opine That Zuffa Could Have Increased  
 11 Compensation.

12 Mr. Davis’s testimony is unnecessary because any juror could conclude Zuffa could have  
 13 paid athletes more because it was profitable during the Class Period. Mot. at 8. Mr. Davis’s  
 14 basic conclusion is that, as a highly profitable company, Zuffa could have reallocated funds to  
 15 increase labor costs substantially. Understanding this concept falls within the ken of any  
 16 layperson. *Id.* Attempting to distinguish cases where experts were excluded for providing  
 17 common-sense opinions, Opp. at 4, Plaintiffs ignore the general principle that animates this  
 18 precedent: expert testimony may not substitute for attorney argument. Plaintiffs claim that the  
 19 complexity of Mr. Davis’s analysis justifies the need for expert testimony, but that misses the  
 20 mark. A trier of fact may not be able to recreate Mr. Davis’s “extensive analysis” of Zuffa’s  
 21 capacity to pay, Opp. at 4 n.5, but that does not mean this analysis will assist the trier of fact, *see*  
 22 *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995).

23 **CONCLUSION**

24 For the foregoing reasons and those in Zuffa’s Motion to Exclude the Testimony of Guy  
 25 A. Davis, the Court should exclude Mr. Davis’s testimony.

26 /

27 /

28 /

1 Dated: May 7, 2018

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing **ZUFFA, LLC'S REPLY IN SUPPORT OF MOTION TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERT GUY A. DAVIS** was served on May 7, 2018 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

/s/ Roderick Crawford

Roderick Crawford